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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 707

REPUBLIC STEEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND STEEL WORKERS' ORGANIZING COMMITTEE

ON PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The petition for rehearing of the petition for a writ of certiorari is based upon a conflict between the decision below and the decision of the United States Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Leviton Mfg. Co.*, decided April 29, 1940, subsequent to the denial of the petition. The conflict exists solely as to the validity of a portion of the back-pay provisions of the lower court's decree in this case, namely those provisions (R. VIII, 6295, 6296,

6298) which require petitioner to pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment on work relief projects of employees who would have been at work in petitioner's plants except for the unfair labor practices in which petitioner engaged. The validity or invalidity of those provisions does not in any way affect the amounts of back pay which petitioner is required to pay to the employees; the decree provides that in computing the amount petitioner is to pay each employee, the sums received by him for work performed upon work relief projects, together with other earnings during the periods in question, are to be deducted from the wages the employee would have received from petitioner had not the unfair labor practices been committed.

Questions concerning the validity of the provisions requiring petitioner to make payments to the governmental agencies financing the work relief projects were before the court on the petition for certiorari. The petition specifically challenged the validity of these provisions and asserted that they were beyond the Board's power under the Act and deprived petitioner of its property without due process of law (Pet. 4, 44–47).

The "work relief" provision of Board orders has been approved by the First Circuit Court of Appeals, as well as by the court below, and has been enforced without discussion by the

Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeals. *National Labor Relations Board* v. *Somerset Shoe Co.*, decided May 9, 1940 (C. C. A. 1st) (see 12 N. L. R. B., at 1061); *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. (2d) 587 (C. C. A. 3rd) (see 10 N. L. R. B., at 889); *Arcadia Hosiery Mills* v. *National Labor Relations Board*, decided March 12, 1940 (C. C. A. 3rd) (see 12 N. L. R. B., at 486); *National Labor Relations Board* v. *Planters Mfg. Co.*, 105 F. (2d) 750 (C. C. A. 4th) (see 10 N. L. R. B., at 760–761); *Hartsell Mills Co.* v. *National Labor Relations Board*, decided April 10, 1940 (C. C. A. 4th) (see 18 N. L. R. B., No. 43, at 21); *Mexia Textile Mills* v. *National Labor Relations Board*, decided March 1, 1940 (C. C. A. 5th) (see 11 N. L. R. B., at 1183); *National Labor Relations Board* v. *Good Coal Co.*, decided March 8, 1940 (C. C. A. 6th) (see 12 N. L. R. B., at 155); *Link-Belt Co.* v. *National Labor Relations Board*, decided March 2, 1940 (C. C. A. 7th) (see 12 N. L. R. B., at 885); *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, decided March 22, 1940 (C. C. A. 7th) (see 11 N. L. R. B., at 319); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, decided April 25, 1940 (C. C. A. 8th) (see 12 N. L. R. B., at 1459); *Southern Colorado Power Co.* v. *National Labor Relations Board*, decided March 25, 1940 (C. C. A. 10th) (see 13 N. L. R. B., at 719). There is one decision in addition to that of the Second Circuit in *National Labor*

Relations Board v. *Leviton Mfg. Co., supra,* holding this provision to be beyond the Board's power. *National Labor Relations Board* v. *Tovrea Packing Co.,* decided April 30, 1940 (C. C. A. 9th).[1]

We submit that the decree of the court below enforcing the "work relief" provisions is correct, and aids proper administration of the Act. Section 10 (c) of the Act empowers the Board, upon findings that the person proceeded against has engaged in unfair labor practices, to issue an order requir-

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[1] In the *Tovrea Packing* case the court said:

"The Act provides for 'reinstatement of employees with or without back pay, as will effectuate the purpose of the Act.' [sic.] For a proper understanding this statement must be read and considered as a whole. To our minds the discretion conferred upon the Board is limited to the point of whether an order for back pay will do more toward effectuating the purposes of the Act than to omit it—or possibly than an order for payment of part thereof. Whether or not this provision is held to be punitive in nature, we see no warrant for doing other than it provides. Certainly it does not authorize the Board to go outside of the statute and prescribe its own coercive measures in aid of 'effectuating' the purposes of the Act. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board* v. *Remington Rand*, 94 Fed. (2d) 862, 872."

Prior to the decisions in the *Leviton Mfg. Co.* and *Tovrea Packing Co.* cases, both the Second and Ninth Circuits enforced the provision, the Second expressly without passing upon its validity and the Ninth without discussion. *National Labor Relations Board* v. *National Casket Co.*, 107 F. (2d) 992 (C. C. A. 2d) (see 12 N. L. R. B., at 175–176); *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d) 76 (C. C. A. 9th) (see 10 N. L. R. B., at 1297–1298).

ing him to cease and desist from such practices "and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act." These provisions "leave to the Board some scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. And this Court held in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48, that Congress could provide for reinstatement with back pay as a proper "sanction for the enforcement of its valid regulation." The "work relief" portions of the Board's order, being but a particular variation of a back pay order, are, we submit, within the general type of order which Congress expressly authorized. They are "adapted to the situation which calls for redress." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348. See *Report of the House Committee on Labor* (House Report No. 1147, 74th Cong., 1st Sess.), p. 18.

No deductions from back pay are required by the statute. Nevertheless, from the beginning the Board has provided in its back-pay orders, as the decree provides in this case, that ordinary earnings obtained from other employment must be deducted.

Such a requirement is equitable because it prevents the employee from obtaining more than he has actually lost in earnings and in that it assumes that the one who has afforded the employee other employment has received *quid pro quo.* In the case of work relief, however, an element is involved in addition to the element of *quid pro quo,* which amply justifies the Board in casting the burden primarily upon the employer responsible for the unemployment. Public funds have been expended to supply work for employees who would have been gainfully employed by the employer except for his unfair labor practices. This expenditure of public funds need not be left unreimbursed; failure to require full reimbursement, particularly in such a case as the present where a large number of men are suddenly thrown out of work in a community, would materially reduce the deterrent effect upon violators of the law of the back-pay provisions of Board orders, and would cast upon public funds the burden of remedying the consequences of violations of the Act. In reason and equity the public policy of the statute is effectuated by requiring this burden to be borne by the employer responsible therefor. The deterrent consideration is strengthened by the fact that the statute carries no fines or penalties for violation. The anticipated extent of a shift of economic burden from the employer to government agencies would vitiate *pro tanto* the only effective deterrent which the Act provides.

The requirement that the employees be reimbursed to the extent of their losses is to no degree punitive against the one responsible for such losses. The decree remains entirely remedial and is not rendered punitive because of its deterrent effect.

Therefore, the portions of the Board's order in question were properly approved by the court below. This being so, the conflict which has arisen on this point by reason of the *Leviton* and *Tovrea* decisions does not require resolution in the present case. In the *Leviton* and *Tovrea* cases the decision invalidating the "work relief" provisions might be important as an unwarranted restriction by the court upon the exercise by the Board of its remedial powers in effectuating the policies of the Act; but in the present case that is not the situation. Where it appears, as here, that the Board was operating well within the bounds of the statute in requiring this particular form of affirmative action, not only under the provisions of the Act expressly authorizing reinstatement of employees with back pay, but also under the general grant of authority to require such affirmative action as will effectuate the policies of the Act, the approval of the order by the court below presents no question of such importance as might be said to exist had the decision been to the contrary.

This proceeding has long been in litigation. The labor strife occurred in the summer of 1936. In the summer of 1937 the complaint (R. I, 13–24) was

issued and hearings were held. The Board issued a decision in April, 1938 (R. I, 59–309). Shortly thereafter petitioner filed a petition in the Court below to review the Board's order. In June, 1938, the Board set aside its order for the purpose of further proceedings (R. I, 317). The court below, upon application by petitioner, enjoined the Board from vacating its order, and directed that the transcript of record be filed with it. Thereafter this Court held that the court below had no jurisdiction to enter these orders. *In the Matter of the Petition of the National Labor Relations Board for a Writ of Mandamus,* 304 U. S. 486. In October 1938 the Board issued its decision and order (R. II, 833–1109), and petitioner filed in the court below its petition to review and set aside the Board's order (R. VII, 5173). In November 1939 the court below handed down its decision (R. VIII, 6277), and it entered its decree on January 2, 1940 (R. VIII, 6294).[2]

The conflict relied upon by petitioner goes to but a minor portion of the decree below. The other provisions require petitioner to cease and desist from the unfair labor practices found, to reinstate with back pay persons discriminatorily discharged

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[2] It will be noted that the employees whose reinstatement is directed because they went on strike as a result of petitioner's unfair labor practices are to receive back pay only from the dates when petitioner refused, upon application, to reinstate them or place their names on a preferential list *after* the Board's order of October 18, 1938 (R. VIII, 6298).

or refused reinstatement, to make whole certain employees for losses suffered by reason of discriminatory lockouts, to offer reinstatement or placement upon a preferential list to employees who went on strike as a result of the unfair labor practices, to withdraw recognition from and disestablish certain labor organizations found to be company-dominated, and to post appropriate notices (R. VIII, 6294–6299). Compliance with these provisions of the decree is completely separable from compliance with the "work relief" provisions. And the question whether the latter provisions are valid is wholly separate from the other questions, going to other provisions of the decree, sought to be reviewed in the petition for certiorari.[3] None of these questions are necessary of determination in order to dispose of the question as to which a conflict exists.

In these circumstances, if the conflict between the decision below and the *Leviton* and *Tovrea* de-

[3] The review sought embraces questions as to (1) the sufficiency of the evidence to sustain the Board's findings in various particulars, which would involve examination of a record of 6,300 pages; (2) the validity of the order requiring the reinstatement of employees who were convicted of or are asserted to have committed various offenses in connection with the strike at petitioner's plants; (3) the interpretation of the Norris-La Guardia Act; (4) the validity of the order requiring the reimbursement for loss of pay of employees who were voluntarily reinstated by petitioner before the Board's order; (5) various details of the reinstatement provisions of the order; and (6) the sufficiency of the charge and of the hearing.

cisions, *supra,* is deemed to warrant review by this Court in the instant case, it would seem appropriate that the review be limited to the validity of the provisions requiring petitioner to reimburse the relief agencies.[4] Were those provisions to be held invalid on such review, they could be eliminated from the three paragraphs of the lower court's decree in which they appear (R. VIII, 6295, 6296, 6298). As we have pointed out (*supra,* p. 2), whether or not this is done, the amounts to be received *by the employees* remain the same. The other action which the order requires petitioner to take (*supra,* pp. 8–9) would likewise be unaffected. If any review is deemed warranted, it is submitted that it should be limited to the one point on which conflict exists. The Board's order is designed to resolve the serious economic dislocation produced by petitioner's extensive violations of the Act, and no good reason appears why the accomplishment of this end should be further postponed because of a conflict of circuits upon a question going to but a minor portion of the order. For this reason also the Government requests that if the petition is granted limited to the validity of the work relief provisions of the decree, that the order of this Court provide that it shall not operate to suspend enforcement of the remaining provisions of the decree below.

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[4] Number 4 of the "Questions Presented" enumerated in the petition for certiorari deals with the work-relief provisions of the decree (Pet. 4).

CONCLUSION

The present case has run a very full course. Unless grave doubt exists as to the correctness of the decision below on the relatively minor aspect in which it conflicts with the *Leviton* and *Tovrea* decisions, it is submitted that the petition for rehearing should be denied. If review is granted, it should be limited to the question upon which a conflict exists.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1940.

Republic Steel Corporation, Petitioner, *vs.* National Labor Relations Board and Steel Workers Organizing Committee.	On petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 12, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The National Labor Relations Board, finding that the Republic Steel Corporation had engaged in unfair labor practices in violation of Section 8(1), 8(2) and 8(3) of the National Labor Relations Act, ordered the company to desist from these practices, to withdraw recognition from a labor organization found to be dominated by the company, and to reinstate certain employees, with back pay, found to have been discriminatorily discharged or denied reinstatement. The Board, in providing for back pay, directed the company to deduct from the payments to the reinstated employees the amounts they had received for work performed upon "work relief projects" and to pay over such amounts to the appropriate governmental agencies. Except for a modification, not now important, the Circuit Court of Appeals directed enforcement of the Board's order. 107 F. (2d) 472.

In view of conflict with decisions in *National Labor Relations Board* v. *Leviton Manufacturing Co.*, 111 F. (2d) 619 (C. C. A. 2d) and *National Labor Relations Board* v. *Tovrea Packing Co,* 111 F (2d) 626 (C. C. A. 9th), we granted certiorari limited to the question whether the Board had authority to require the company to make the described payments to the agencies of the Government. 310 U. S. 655.

The amounts earned by the employees before reinstatement were directed to be deducted from their back pay manifestly because, having already been received, these amounts were not needed to make the employees whole. That principle would apply whether the employees had earned the amounts in public or private employment. Further, there is no question that the amounts paid

by the governmental agencies were for services actually performed. Presumably these agencies, and through them the public, received the benefit of services reasonably worth the amounts paid. There is no finding to the contrary.

The Board urges that the work relief program was designed to meet the exigency of large-scale unemployment produced by the depression; that projects had been selected, not with a single eye to costs or usefulness, but with a view to providing the greatest amount of employment in order to serve the needs of unemployed workers in various communities; in short, that the Work Projects Administration has been conducted as a means of dealing with the relief problem. Hence it is contended that the Board could properly conclude that the unfair labor practices of the company had occasioned losses to the Government financing the work relief projects.

The payments to the Federal, State, County, or other governments concerned are thus conceived as being required for the purpose of redressing, not an injury to the employees, but an injury to the public,—an injury thought to be not the less sustained although here the respective governments have received the benefit of the services performed. So conceived, these required payments are in the nature of penalties imposed by law upon the employer,—the Board acting as the legislative agency in providing that sort of sanction by reason of public interest. We need not pause to pursue the application of this theory of the Board's power to a variety of circumstances where community interests might be asserted. The question is,—Has Congress conferred the power upon the Board to impose such requirements.

We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

The remedial purposes of the Act are quite clear. It is aimed, as the Act says (Section 1) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers

of full freedom of association, of self organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives. This right of the employees is safeguarded through the authority conferred upon the Board to require the employer to desist from the unfair labor practices described and to leave the employees free to organize and chose their representatives. They are thus protected from coercion and interference in the formation of labor organizations and from discriminatory discharge. Whether the Act has been violated by the employer—whether there has been an unfair labor practice—is a matter for the Board to determine upon evidence. When it does so determine the Board can require the employer to disestablish organizations created in violation of the Act; it can direct the employer to bargain with those who appear to be the chosen representatives of the employees and it can require that such employees as have been discharged in violation of the Act be reinstated with back pay. All these measures relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole.

As the sole basis for the claim of authority to go further and to demand payments to governments, the Board relies on the language of Section 10(c) which provides that if upon evidence the Board finds that the person against whom the complaint is lodged has engaged in an unfair labor practice, the Board shall issue an order—

"requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act".

This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order". We have said that the power to

command affirmative action is remedial, not punitive. *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, 235, 236. See, also, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 267, 268. We adhere to that construction.

In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

We think that affirmative action to "effectuate the policies of this Act" is action to achieve the remedial objectives which the Act sets forth. Thus the employer may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining-representative of his employees; he may be ordered to cease particular methods of interference, intimidation or coercion, to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard. These are all remedial measures. To go further and to require the employer to pay to governments what they have paid to employees for services rendered to them is an exaction neither to make the employees whole nor to assure that they can bargain collectively with the employer through representatives of their own choice. We find no warrant in the policies of the Act for such an exaction.

In truth, the reasons assigned by the Board for the requirement in question—reasons which relate to the nature and purpose of work relief projects and to the practice and aims of the Works Project Administration—indicate that its order is not directed to the appropriate effectuating of the policies of the National Labor Relations Act, but to the effectuating of a distinct and broader policy with respect to unemployment. The Board has made its requirement in an apparent effort to provide adjustments between private employment and public work relief, and to carry out supposed policies in relation to the latter. That is not the function of the Board. It has not been assigned a rôle in relation to losses con-

ceived to have been sustained by communities or governments in connection with work relief projects. The function of the Board in this case was to assure to petitioner's employees the right of collective bargaining through their representatives without interference by petitioner and to make good to the employees what they had lost through the discriminatory discharge.

We hold that the additional provision requiring the payments to governmental agencies was beyond the Board's authority, and to that extent the decree below enforcing the Board's order is modified and the cause is remanded with directions to enter a decree enforcing the Board's order with that provision eliminated.

It is so ordered.

Mr. Justice ROBERTS took no part in the consideration and decision of this case.

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Test:

Clerk, Supreme Court, U. S.

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SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1940.

Republic Steel Corporation, Petitioner, *vs.* National Labor Relations Board and Steel Workers Organizing Committee.	On petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 12, 1940.]

Mr. Justice Black and Mr. Justice Douglas:

It might fairly be implied by the words "reinstatement of employees with or without back pay" that the employees must themselves be the recipients of the back pay. Were the opinion based on that ground we would acquiesce. But the judgment here does not rest upon such an interpretation. The holding appears to be on the broad ground that the Board may not require full back pay, even to a wrongfully discharged employee, if he has received pay for services performed on a governmental relief project provided exclusively for the needy unemployed. With this conclusion we cannot agree.

The statute commands that the Board must order "back pay" if the policy of the Act will thereby be effectuated. At least two persons are immediately involved in "back pay", as here used; one who pays and one who receives. The propriety of a "back pay" order as an instrumentality for effectuating the Act's policies, must therefore be determined by the manner in which it influences the payor and payee, one, or both. The central policy of the Act is protection to employees from employer interference, intimidation and coercion in relation to unionization and collective bargaining. We cannot doubt but that a back pay order as applied to the employer will effectually aid in safeguarding these rights. We believe, as did the Board and the court below, that it may well be said that the policies of the Act will be effectuated by denying to an offending employer the opportunity of shifting to government relief agencies the burden of supporting his wrongfully discharged employees. The knowledge that he may be called upon to pay out the

wages his employees would have earned but for their wrongful discharge, regardless of any assistance government may have rendered them during their unemployment, might well be a factor in inducing an employer to comply with the Act.

And the construction of the provision for back pay is not helped by labeling the Act's purpose or the Board's action as either "punitive" or "remedial." The "back pay" provision is clear and unambiguous. Hence, it is enough here for us to determine what Congress meant from what it said.

Nor is there substance to the expressed fear that complete acceptance of the words as Congress wrote them would vest unlimited discretion in the Board, because it would not. That discretion is narrowly limited, by the fact that as to "back pay" the Board can in no instance award any greater sum than "back pay" for the period in which the employee was absent from his employer's services by reason of his employer's violation of the law.